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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

No. 91-1957

CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION,

Petitioner,

v.

STEVEN A. BOOK; DANIEL E. LUNGREN,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that Proposition 65 point-of-sale signs and other warnings are not preempted by the specific preemption clause of the Federal Insecticide, Fungicide and Rodenticide Act which preempts additional or different state "labeling" requirements.

2. Whether the Ninth Circuit properly ruled that Proposition 65 point-of-sale signs and other warnings are not preempted by the specific preemption clause of the Federal Hazardous Substances Act which preempts nonidentical state "labeling" requirements.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-19a) is reported at 958 F.2d 941. The decision of the

1. Pursuant to State of California Executive Order W-15-91, on July 17, 1991, all official responsibility for the implementation of Proposition 65 that previously had been assigned to the California Health and Welfare Agency was reassigned to the Office of Environmental Health Hazard Assessment, a department within the California Environmental Protection Agency. The Interim Director of that Office is Steven A. Book, who therefore has succeeded to all responsibilities of respondent Clifford L. Allenby. Daniel E. Lungren succeeded respondent John K. Van de Kamp as Attorney General of California on January 7, 1991.

District Court for the Northern District of California (Pet. App. 20a-26a) is reported at 744 F.Supp. 934.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATEMENT OF THE CASE

This case involves a facial challenge to California's Proposition 65, a voter initiative that requires businesses to provide warnings before exposing individuals to harmful levels of certain toxic chemicals. Cal. Health & Safety Code § 25249.5 *et seq.* (West Supp. 1992). Petitioner seeks declaratory and injunctive relief that all possible applications of the statute's warning requirement to pesticides and consumer products are preempted by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* (1980 & Supp. 1992) and the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. § 1261 *et seq.* (1982 & Supp. 1992).[2/]

Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, is a California initiative statute overwhelmingly passed by a vote of the people in November of 1986. The warning requirement of the statute provides that "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual." Cal. Health & Safety Code, § 25249.6.

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2. Contrary to petitioner's suggestion (Pet. 3), the complaint seeks a judgment that *all* Proposition 65 warning methods are preempted, not just point-of-sale warning requirements.

The statute does not define the term warning, but explains that:

> "Warning" within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, *posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable.*

Id., § 25249.11(f). (Emphasis added.)

Implementing regulations promulgated by the State further identify certain methods of providing warnings for consumer products that are deemed to comply with the statute (i.e. "safe harbors"), but also allow businesses to use other warning methods that are "clear and reasonable." Cal. Code Regs., tit. 22, § 12601(b) (1991). For consumer products, the "safe harbors" include (1) product labeling; and (2) shelf labeling, signs, menus, or a combination thereof.

FIFRA requires the Environmental Protection Agency ("EPA") to register a pesticide before it can be sold or used. 7 U.S.C. § 136a. Before registering a pesticide, EPA evaluates the data concerning the product's potential harmful effects. *Id.* § 136a (c)(2). As part of this process, all "labeling" must be submitted to EPA for its advance approval. The statute's labeling requirements are designed to assure that the product can be used without "unreasonable adverse effects on the environment." 7 U.S.C. § 136a (c)(5)(C) & (D).

The FHSA regulates consumer products that are intended for use or are packaged in a form suitable for use in the household or by children. 15 U.S.C. § 1261(p). The act's central requirement is that marketers of

consumer products that are "hazardous substances" must provide "cautionary" labels on their products. *Id.* The FHSA does not require that product labels be approved by the Consumer Product Safety Commission, ("CPSC"), which enforces the act, but leaves manufacturers free to devise their own language provided it meets the requirements of the act.

Both FIFRA and the FHSA contain narrow preemption clauses. Under FIFRA, States may regulate the sale or use of pesticides, but may not impose any different or additional "labeling" requirements. 7 U.S.C. § 136v (a) & (b). The FHSA authorizes states to ban certain products lawfully sold under federal law but precludes states from adopting nonidentical "labeling" requirements where there is a federal cautionary labeling requirement in effect. 15 U.S.C. § 1261n (b)(1)(A).

Petitioner filed this action in March, 1989. It did not allege any concrete application of Proposition 65 or even that any of its members had been required to provide a Proposition 65 warning. In the district court, both parties moved for summary judgment. The court denied Petitioner's motion and granted Respondent's cross-motion for summary judgment. *Chemical Specialties Manufacturers Ass'n* v. *Allenby*, 744 F.Supp. 934 (N.D. Cal. 1990) (hereinafter "*Allenby*").

The trial court rejected Petitioner's claim that FIFRA and the FHSA expressly preempt Proposition 65's warning requirement. It found that some Proposition 65 warning methods, including point-of-sale signs, were not "labeling" under either federal statute. Pet. App. at 21a, 22a n. 1.[3/]

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3. The court incorporated by reference its earlier decision in the related FIFRA preemption case of *D-Con* v. *Allenby*, 728 F.Supp. 605, 607 (N.D. Cal. 1990).

The district court further ruled that "[n]o evidence shows the impossibility of complying with both the federal and state statutes," and that no competent evidence supported Petitioner's assertion that Proposition 65 would undermine the goals of federal law by causing consumer confusion. Pet. App. at 26a. Finally, the Court held that "Congress clearly did not intend to occupy this entire area of regulation, as evidenced by the fact that states are expressly allowed certain functions under both FIFRA and FHSA." *Id.*

The Ninth Circuit, in a 3-0 decision, affirmed. As to express preemption, the court concluded that while FIFRA expressly preempts additional *labeling* requirements, Proposition 65's *warning* requirements do not constitute additional labeling. Pet. App. at 9a. It cited point of sale signs as one Proposition 65 warning method that was not "labeling", while leaving open the possibility that other warning methods also might be outside the scope of preempted "labeling". Pet. App. at 4a, 5a. With respect to the FHSA, the Ninth Circuit found that Proposition 65 point of sale warnings were not preempted for two independent reasons: one, they were not "labeling", as defined by federal law, and two, they were not necessarily "nonidentical" to federal requirements. Pet. App. at 17a.[4/]

The Ninth Circuit found no support in the legislative history of FIFRA or the FHSA to support Petitioner's claim that Congress intended to occupy the field of warnings for pesticides or hazardous household products, Pet. App. at 7a-8a, consistent with this Court's holding in *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476 (1991) (hereinafter "*Mortier*").

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4. The court noted that since Petitioner had mounted a facial challenge to Proposition 65, it had to demonstrate "that all possible consumer product warnings that would satisfy Proposition 65 conflict with provisions of the federal statutes." Pet. App. at 4a.

Finally, the court of appeals determined that there were no actual conflicts between Proposition 65 and federal law, since Proposition 65 does not force manufacturers to alter their FIFRA labels and does not necessarily impose requirements which are "nonidentical" to those mandated by the FHSA. Pet. App. at 18a-19a.

SUMMARY OF ARGUMENT

FIFRA, which regulates pesticides, and the FHSA, which regulates household toxins, preempt any state from adopting additional or different "labeling" requirements. Proposition 65 requires businesses to provide "clear and reasonable warnings." For consumer products, including pesticides, these warnings may be given through a sign or display in the retail store, and are *not* required to appear on the product's labeling. Proposition 65 therefore is not preempted under the specific and exclusive preemption provisions of these two federal statutes.

In upholding the validity of Proposition 65, the court of appeals properly applied this Court's long-standing rules that state statutes are not to be preempted unless this is the "clear and manifest purpose of Congress", *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and that the presumption against preemption is particularly strong in areas of health and safety regulation. *Hillsborough County* v. *Automated Med. Labs*, 471 U.S. 707, 719 (1985). Moreover, under this Court's recent decision in *Cipollone v. Liggett Group, Inc.*, No. 90-1038, 1992 U.S. LEXIS 4365 (June 24, 1992) (hereinafter "*Cipollone*"), the presumption against preemption "reinforces the appropriateness of a narrow reading" of a preemption provision. *Id.* at *26.

Petitioner argues extensively that Proposition 65 is preempted due to "conflict" with the goals of FIFRA and the FHSA. But as the Court ruled in *Cipollone*, when

Congress has enacted an explicit preemption clause, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation . . . [since] Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted." *Cipollone* at *24-25. Thus, while Congress could impose on the several states a uniform system of health hazard disclosure requirements for household products and pesticides, it has scrupulously avoided doing so. Instead it chose to adopt narrow preemption provisions, and while Petitioner asserts that the Congressional choice was improper, the district court and the court of appeals properly honored it.

In the only appellate decision related to this case, a New York statute was found not be preempted by the Court of Appeals for the Second Circuit, *New York Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989) (hereinafter "*Jorling*"), a decision explicitly followed by the Ninth Circuit in *Allenby*. Thus, this case presents no conflict among the circuits.[5/] Accordingly, no review by this Court is needed or appropriate.

ARGUMENT

I. THE CASE INVOLVES A SINGLE STATE LAW AND DOES NOT PRESENT ANY NATIONWIDE ISSUES THAT MERIT THE COURT'S REVIEW

In a strained effort to capture the Court's attention, Petitioner predicts that because of the Ninth Circuit's

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5. Petitioner's claim of a conflict between the Ninth Circuit's ruling and this Court's decision in *Kordel v. United States*, 335 U.S. 345 (1948) (Pet. 21-22) is incorrect. As discussed *infra* at 13, *Kordel* construed the meaning of "labeling" under a different federal statute, and with reference to the federal government's authority to regulate deceptive advertising claims, not in the context of preemption of state laws.

decision, hordes of states will now adopt their own versions of Proposition 65, leading to a multiplicity of warning requirements. This is pure speculation. Almost six years since its adoption in 1986, Proposition 65 remains unique among the fifty states. While similar laws have been considered in a few states, none have been adopted. Whether such statutes will be enacted, what type of requirements they will impose, whether these requirements will even implicate federal interests, how the statutes will be applied, and how the state and lower federal courts will interpret such statutes and reconcile them (if necessary) with FIFRA and the FHSA, are all matters of conjecture.

Moreover, Petitioner's far-fetched assertions about the "disastrous consequences" (Pet. 12) that Proposition 65 will have on federal regulation are contradicted by what the federal agencies themselves say about the statute. William Reilly, the Administrator of EPA (which administers FIFRA), has written: "[t]he law simply warns people about their exposure to carcinogenic or reproductively toxic chemicals at levels exceeding 'no significant risk.' It is hard to argue with providing information to the public."[6/] In that same letter, Reilly pointed out that a 1988 White House Working Group had concluded that the economic costs of Proposition 65 were "relatively minimal," praised the statute's reliance on market incentives to reduce consumers' exposures to toxic chemicals, and noted that industry's predictions of dire consequences from the operation of Proposition 65 (regurgitated by Petitioner here) had proven to be unfounded. *Id.* at 1-2.[7/]

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6. Attachment F to Declaration of Clifford Rechtschaffen at 1, Clerk's Record ("CR") 34.

7. The Reilly letter was written to Health and Human Services ("HHS") Secretary Louis Sullivan because industry had requested HHS to issue an administrative regulation preempting Proposition 65 as applied to products regulated by the Food and Drug Administration.

II. FIFRA DOES NOT PREEMPT PROPOSITION 65

A. FIFRA Only Preempts State "Labeling" Requirements; Proposition 65 Does Not Require "Labeling" Within the Meaning of the Express Preemption Provision of FIFRA

In 1972, Congress first included a provision within FIFRA addressing the authority of states to regulate pesticides. Section 24 of FIFRA now provides:

> § 136v Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v.

1. Point-of-Sale Signs Satisfy Proposition 65

Proposition 65's "safe harbor" regulations explicitly state that point-of-sale signs comply with the warning

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Reilly argued that "there are very strong reasons not to move forward with federal pre-emption of the law." *Id.* at 1.

requirement. While labels are one authorized method (Cal. Code Regs., tit. 22, § 12601(b)(1)(A)), the regulations also allow a warning through "Identification of the product at the retail outlet in a manner which provides a warning. Identification may be through shelf labeling, signs, menus, or a combination thereof." *Id.* § 12601(b)(1)(B). The warning material is required only to be "displayed at the retail outlet with such conspicuousness . . . as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use." *Id.* § 12601(b)(3). It might be located immediately adjacent to the product, or in some other location where it is likely to be seen by purchasers of the product.[8/]

2. Point-of-Sale Signs Are Not "Labeling" as Defined in FIFRA

FIFRA defines "labeling" as follows:

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8. Petitioner argues that Cal. Code Regs., tit. 22, § 12601(b)(5), which states that manufacturers "shall provide a warning to any person to whom the product is sold or transferred," requires the warning signs to flow through the chain of distribution. This section does not require manufacturers to provide the warning signs themselves, just sufficient information to advise the next party of the need to give a warning. As the California Health and Welfare Agency (the state agency with authority to promulgate implementing regulations under Proposition 65) explained in its Statement of Reasons accompanying adoption of this rule, the regulation "merely attempts to ensure that goods passing through a distribution chain are accompanied by warning materials *or information*, so that "the person who finally distributes the product to the consuming public will have knowledge of the need to warn, and will do so." (Final Statement of Reasons at 30-31, Attached to Declaration of Clifford Rechtschaffen, CR 34.) (Emphasis added.) Thus, it does not require that the materials flow with the product, simply that the party handling the product at some point be advised of its nature.

> The term "labeling" means all labels and all written, printed, or graphic matter--
>
> (A) accompanying the pesticide or device at any time; or
>
> (B) to which reference is made on the label or in literature accompanying the pesticide or device(.)

7 U.S.C. § 136(p). Petitioner argues that if the product and the graphic material are in physical proximity to each other at any single point in the entire process from manufacture through use, then the material is labeling. This construction, however, would be contrary to clear case law, EPA's interpretation of the law, and to the purposes of FIFRA.

The court of appeals, consistent with *Cipollone's* instruction that specific preemption clauses are to be narrowly construed, 1992 U.S. LEXIS 4365 at *26, rejected this expansive construction, logically reasoning that:

> FIFRA's definition of labeling cannot encompass every type of written material accompanying the pesticide at any time. If this were true, then price stickers affixed to shelves, sheets indicating that a product is on sale, and even the logo on the exterminator's hat would all constitute impermissible labeling.

In so finding, the court followed the only other reported case on the meaning of "labeling" under FIFRA, *New York Pesticide Coalition v. Jorling, supra*, in which the Second Circuit also rejected a FIFRA preemption challenge to a state pesticide notification requirement. The court in *Jorling* dismissed the claim that such notification materials were "labeling," noting that "'labeling' comprises those materials designed to *accompany the product through the*

stream of commerce to the end user, but not those designed to notify purchasers of services or the general public." *Jorling*, 874 F.2d at 120 (emphasis added). This approach--focusing on whether the materials travel through the stream of commerce with the product--is fully consistent with the purposes of the preemption clause and existing case law.

Moreover, two specific provisions of FIFRA clearly recognize that the term "labeling" does not encompass all types of informational materials that are used in connection with the sale or distribution of FIFRA-registered products.

First, FIFRA specifically mandates that any "labeling" be available to the consumer *during use* of the product, which necessarily means that a point-of-sale sign that is not taken home with the product cannot be "labeling." A FIFRA-registered product is defined as "misbranded" unless information required to appear on the label or labeling is "likely to be read and understood by the ordinary individual under customary conditions of purchase *and use*." (§ 136(q)(1)(E).) (Emphasis added.) Thus, if a pesticide company attempted to satisfy a "labeling" requirement by including the required information in point-of-sale materials, the product would be misbranded and violate the law.

Second, although all FIFRA labeling must be pre-approved by EPA, the statute separately regulates other claims made as part of the distribution and sale of a product, a provision that would be entirely superfluous if all such claims were already part of the approved "labeling." In 1972, Congress amended the statute to prohibit the sale or distribution of a product "if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it . . . in connection with its registration(.)" 7 U.S.C. § 136j(a)(1)(B), Pub. L. No. 92-516 §12(a)(1)(B), *reprinted in* 1972 U.S.C.C.A.N. 1139, 1159. This amendment was

necessary only because Congress recognized that many materials used as part of a product's "sale or distribution" in fact are not labeling.

Nor is the court of appeals' decision inconsistent with this Court's decision in *Kordel v. United States*, 335 U.S. 345 (1948), in which the Court construed the definition of labeling in the Food, Drug and Cosmetic Act (which has no express preemption provision). In *Kordel*, an individual had made deceptive and false statements about foods, but claimed exemption from the law because the statements were made in various brochures and advertisements mailed separately from the actual food products themselves. *Id.* at 346-47. The materials in question contained the only instructions for use of the product, none being on the package itself, thus the court found that they constituted "an essential supplement to the label." *Id.* at 348. Accordingly, this Court found that to exclude such materials from the definition of labeling in that case would "create an obviously wide loophole" that would frustrate the Act's purpose of protecting consumers. *Id.* at 349. As the court of appeals noted, *Kordel* considered the term "labeling" in the context of the need to assure governmental jurisdiction over misleading promotion, not in the context of preemption, with its much narrower purpose of easing nationwide distribution. Pet. App. at 11a-12a. *Kordel*, born of the need to prevent deception, cannot be mechanically applied to a case dealing with Congress' preemptive intent.[9/]

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9. Unlike FIFRA, the Food, Drug and Cosmetic Act has no specific provision prohibiting claims that "substantially differ" from those made during the registration process, 7 U.S.C. § 136j (a)(1)(B), *supra*. Under FIFRA, Congress has acted to assure that neither EPA nor the courts need to expand the definition of "labeling" in order to prevent such circumvention of the Act's requirements.

B. The Preemptive Scope of FIFRA Is Governed by Its Express Preemption Clause

Petitioner argues extensively (Pet. 17-21) that Proposition 65 is impliedly preempted because it will cause consumer confusion and undermine the purposes of FIFRA, thus inviting this Court to undertake the type of broad analysis it rejected in *Cipollone*. In *Cipollone*, (unlike here), one of the explicit purposes of the Cigarette Labeling Act's preemption clause was to guard against "diverse, nonuniform and confusing" regulations, 15 U.S.C. § 1331 (1982 & Supp. 1992). This Court nonetheless found it unnecessary to consider whether state law was impliedly preempted because it undermined the objectives of Congress, given the statute's express preemption language. *Cipollone* at *24-25.

Even prior to *Cipollone*, this Court ruled in *Mortier* that FIFRA does not generally or impliedly preempt state or local laws, but instead preempts only to the extent it specifically so provides. Any inference that Congress intended to occupy an entire field or assert a dominant federal interest cannot be squared with the explicit authority of states under FIRFA to regulate "sale or use" of pesticides. Nor is any intent to preempt anything other than labeling requirements apparent in the legislative history. Quite the opposite, the legislative history states Congressional intent quite clearly: "States are left free to impose whatever restrictions they may wish (other than labeling and packaging)." H.R. Rep. No. 511, 92nd Cong., 1st Sess. (September 25, 1971). Or, as this Court found, "To the contrary, the statute leaves ample room for States and localities to supplement federal efforts even absent the express regulatory authorization of § 136v(a)." *Mortier*, 111 S.Ct. at 2486.

As this Court stated with respect to the *Mortier* plaintiffs' claims of "disaster" from non-federal regulation: "As with the specter of the gypsy moth, Congress is free to find that local regulation does wreak such havoc and

enact legislation with the purpose of preventing it." *Mortier,* 111 S.Ct. at 2487.[10/]

III. PROPOSITION 65 IS NOT PREEMPTED BY THE FHSA

A. The FHSA Only Preempts Nonidentical "Labeling" Requirements; Proposition 65 Neither Requires "Labeling" Nor Imposes Nonidentical Requirements

The FHSA's preemption clause provides that where a hazardous substance is subject to a cautionary labeling requirement under the act, no state may "establish a cautionary labeling requirement . . . designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement [under the FHSA]." 15 U.S.C. § 1261n (b)(1)(A). The Ninth Circuit correctly ruled that Proposition 65 point-of-sale warnings did not fall within the statute's narrow preemption clause for two independent reasons: first, such warnings are not "labeling," and second, they are not necessarily nonidentical to federal requirements. Pet. App. at 17a.

1. Proposition 65 Does Not Require "Labeling" As Defined by the FHSA

"Labeling" under the FHSA is defined even more narrowly than under FIFRA, because it includes only

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10. Petitioner's claims about the impact that Proposition 65 would have on FIFRA's labeling scheme are in any case unsupported by any competent evidence. The district court reviewed Petitioner's "expert" declarations purporting to show that Proposition 65 undermined the purposes of federal law, and found them to be incompetent and unpersuasive. Pet. App. at 26a.

labels on the immediate container of any hazardous substance, or on any accompanying literature that provide "*directions for use*." 15 U.S.C., § 1261(n).[11/] It does not encompass point-of-sale signs or other means of consumer notification that do not provide "directions for use." Since Proposition 65 explicitly allows businesses to warn through point-of-sale signs or other methods that do not contain "directions for use", it is not "labeling" under the FHSA.

To escape this straightforward conclusion, Petitioner contends that a Proposition 65 warning is the same thing as "directions for use." The court of appeals found this argument not just contrary to Congressional intent, but "nonsensical." Pet. App. at 18a. Congress limited "labeling" to the subset of accompanying literature containing "directions for use"; as the district court found, Petitioner's argument would "read the phrase 'where there are directions for use' right out of the statute." Pet. App. at 23a, n. 2.

Petitioner seeks to draw the Court's attention to a letter from (now former) CPSC General Counsel Clement D. Earhardt, III discussing the term "directions for use," but misleads the Court about the status and import of that letter. The letter was *not* part of the record below, either before the district court or court of appeals. Petitioner filed a motion near the end of the appellate briefing schedule requesting that the Ninth Circuit take judicial notice of the letter, but the court of appeals never

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11. The statute defines "label" as "a display of written, printed or graphic matter upon the immediate container of any substance." 15 U.S.C. § 1261(n). "Labeling" includes all "accompanying literature which provide directions for use, written or otherwise." 15 U.S.C. § 1261(n)(2). The CPSC has defined "accompanying literature" to be "any placard, pamphlet, booklet, sign or other written, printed or graphic matter or visual device that provides directions for use, written or otherwise, and that is used in connection with the display, sale, demonstration, or merchandising of a hazardous substance. . . ." 16 C.F.R. § 1500.3(c)(9) (1992).

granted it.[12]

Moreover, Petitioner's argument that the letter is entitled to deference based on *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) is wholly misplaced. The general counsel does not have rulemaking authority or responsibility for administering the FHSA.[13] Moreover, his opinion is not a long-standing interpretation of the CPSC based on its actual administrative practice, and in fact has never been applied by the agency in any regulatory or enforcement context. In addition, although CPSC is not a party to this action, the letter is clearly litigation-inspired, in that it was sent in the midst of the briefing schedule before the Ninth Circuit, and in response to a request by Petitioner. Thus, the counsel's letter is most appropriately analogized to positions taken by agency counsel in the course of litigation, which this Court has said are not entitled to deference. *Bowen* v. *Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988).

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12. The Ninth Circuit had ample grounds for refusing to supplement the record with this letter so far into the case. *Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 528 (9th Cir. 1985); *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 367 (9th Cir. 1989). The court also apparently denied a motion by Respondents to supplement the record with a letter from EPA approving a company's request to add a Proposition 65 warning to its existing FIFRA label. The letter provides further evidence that even if Proposition 65 is construed to require "labeling", there is no conflict between the statute and FIFRA, since a company can potentially comply with Proposition 65 by supplementing its EPA-approved label.

13. CPSC regulations emphasize that legal opinions of the General Counsel "may be changed or superseded by the Commission." 16 C.F.R. §1000.7(a) (1992).

2. Proposition 65 Warnings Are Not "Nonidentical" to Federal Requirements

Regardless of whether Proposition 65 warnings are interpreted as labeling that provides "directions for use", they are not preempted because the FHSA only displaces state requirements that are "nonidentical" to federal standards. Congress wanted to "permit States to adopt requirements identical with the Federal requirements for substances subject to the Federal Act, and to enforce them to complement Federal enforcement." *See* H.R. Rep. No. 2166, 89th Cong., 2d Sess. (1966), *quoted in* 1966 U.S.C.C.A.N. 4097. The Ninth Circuit properly cited this as an alternative ground for rejecting Petitioner's express preemption claims, noting "Proposition 65 warnings are not necessarily nonidentical to the warnings required under the FHSA". Pet. App. at 18a.

As Petitioner acknowledges, the FHSA does not require that any specific language be used on its labels. Pet. at 29. The statute requires that labels contain "the signal word "WARNING" or CAUTION" and words that describe the potential hazard. 15 U.S.C. § 1261(p)(1)(D) & (E). Proposition 65 likewise does not mandate the use of any particular language, but requires only that the warning provide a clear statement of the health risks posed by the chemical in question, Cal. Code Regs., tit. 22, § 12601(a), which directly parallels the FHSA's requirements.

As the court of appeals recognized, the same warning message can be used to comply with both statutes. Pet. App. at 18a. The record below contained evidence of at least one company that had done precisely that, a warning which was reviewed and informally approved by the State.[14/]

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14. *See* Declaration of Dr. Steven Book, ¶¶ 3-5. (CR 46.)

Petitioner protests that a warning message containing a reference to "the State of California", cited as an example by the Ninth Circuit, would undermine the FHSA label. Pet. at 29. Even if this claim were true (and the district court found no evidence to support it), the court of appeals merely offered the message as one alternative that could satisfy both federal and state law; other warning messages, which do not refer to the "State of California", can also be used.[15/]

B. The Preemptive Scope of the FHSA is Limited to Its Express Preemption Clause

Since the FHSA, like FIFRA, contains express preemption language, *Cipollone* precludes the implied preemption arguments urged by Petitioner. In any event, it is clear that Congress intended to enact a "limited preemption amendment [that] relates only to labeling." *See* H.R. Rep. No. 2166, 89th Cong., 2d Sess. (1966), *quoted* in 1966 U.S.C.C.A.N. 4097. Congress further narrowed the preemption clause in 1976. The original version preempted "any and all" state laws for cautionary labeling "of any substance or article" which differed from the "requirements or exemptions of the FHSA."[16/] The 1976 (and current) clause restricts preemption to only those instances where there is a federal labeling requirement in effect and a State imposes a different

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15. The warning language for consumer products suggested in the regulations that includes a reference to "the State of California" is not mandatory. The regulations also endorse another warning message (for alcoholic beverages) which omits this reference entirely, Cal. Code Regs., tit. 22, § 12601(b)(4)(E). Petitioner may dispute that references to the State of California are not required, but exactly what language is sufficient to comply with Proposition 65 has yet to be litigated. This is a matter that properly should be decided in the first instance in the courts of California, and not by this Court.

16. Child Protection Act of 1966, Pub. L. No. 89-756, § 4(b), 80 Stat. 1303 (1966), *reprinted* in 1966 U.S.C.C.A.N. 1524.

labeling requirement that seeks to warn about the same hazards presented by a consumer product.

The fact that Congress preserved many areas of state authority in the FHSA further negates any inference of a broad preemptive intent. Under the statute, states are free to ban entirely products which could otherwise be lawfully sold under the FHSA, so long as the state standards afford a higher degree of consumer protection than the federal requirements. 15 U.S.C. § 1261n (b)(4); *see* S.R. Rep. No. 94-251, 94th Cong., 2d sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 1004. States also may impose labeling requirements that protect against different consumer risks than those addressed by federal law. 15 U.S.C. § 1261n (b)(1)(A).

Petitioner also contends that Proposition 65 undermines the objectives of federal law because its warning provision will impair the integrity of the FHSA's labeling requirement and undermine the goal of "uniformity in labeling." Pet. at 26-27. But as Congress made explicit in 1976, it did not intend to impose a uniform warning system:

> This preemption scheme is designed to meet the competing interests of those who view Federal requirements as merely minimum standards and those who would opt for uniform national requirements.

S.Rep. No. 251, 94th Cong., *supra*, *reprinted in* 1976 U.S.C.C.A.N. 993, 1004.

As in FIFRA, the congressional concern here was to ease interstate distribution practices for national manufacturers, not to impose a uniform warning system. In any event, Petitioner's contention that Proposition 65 somehow undermines the FHSA's labeling scheme is unsupported by any valid or competent evidence. Pet. App. at 26a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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